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PLAYING BY THE RULE: HOW ABA MODEL RULE 8.4(G) CAN REGULATE JURY EXCLUSION

Anna Offit*

Discrimination during voir dire remains a critical impediment to empaneling juries that reflect the diversity of the United States. While various solutions have been proposed, scholars have largely overlooked ethics rules as an instrument for preventing discriminatory behavior during jury selection. Focusing on American Bar Association Model Rule of Professional Conduct 8.4(g), which regulates professional misconduct, this Article argues that ethics rules may, under certain conditions, deter the exclusionary practices of legal actors. Part I examines the specific history, evolution, and application of revised Model Rule 8.4(g). Part II delves into the ways that ethics rules in general, despite their limited use, can spur legal and cultural change. Focusing on jury exclusion, Part III shows how Model Rule 8.4(g) in particular might be applied to more effectively challenge and sanction instances of race- and sex-based discrimination during voir dire. In so doing, this Article reaffirms the productive role that ethics rules can play in preventing forms of misconduct that undermine confidence in the American jury and justice system.

INTRODUCTION

Renewed attention to racism and sexual harassment in American society has helped to amplify concerns about the ongoing problems of race- and sex-based discrimination in the U.S. legal system. The legal profession in particular has become a focus of criticism. For example, the media has put a

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spotlight on state bar association surveys¹ that expose chronic workplace mistreatment and federal lawsuits that reveal the disparate treatment of female employees.² Not long before #MeToo initiated a national conversation about sexual assault, the American Bar Association (ABA) sought to address the problems of harassment and discrimination with a revision to Model Rule of Professional Conduct 8.4(g). Notably, the amended rule included a newly formulated subsection (g), which defined professional misconduct as: “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”³

The most explicit qualification to Model Rule 8.4, aside from an ambiguous carve-out for “legitimate advocacy”⁴ discussed in Part III, appears in one of the rule’s comments. Revised Comment 5 to Model Rule 8.4(g) notes that in the context of jury selection proceedings, “a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).”⁵ This Article considers the implications of the revised rule, and Comment 5 in particular, for the pervasive problem of race- and sex-based exclusion in the American jury system. First, as written, the comment leaves open the possibility that lawyers and judges who violate antidiscrimination law during the jury selection process can face sanctions. The possibility of punishment for discriminatory behavior, paired with the rule’s inclusion of an objective mens rea standard, thus has the potential to enhance the antidiscrimination protections currently in place to promote representative juries.⁶

Part I provides a brief overview of the history and adoption of Model Rule 8.4(g) since its 2016 revision. Part II examines how ethics rules influence attorney behavior even in cases that do not result in adjudicated violations or

1. See, e.g., Robert J. Derocher, *As Women Lawyers Across the Country Say #MeToo, Bar Associations Play an Important Role*, BAR LEADER (Sept./Oct. 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/september-october/as-women-lawyers-across-the-country-say-metoo-bar-associations-play-an-important-role [https://perma.cc/F734-HMX3] (citing survey results and feedback from Massachusetts, South Dakota, Florida, and Iowa, each addressing experiences of gender and sexual harassment, misconduct, and discrimination in the legal profession).

2. Tiffany Hsu, *Jones Day Law Firm Is Sued for Pregnancy and Gender Discrimination by 6 Women*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/business/jones-day-pregnancy-discrimination.html> [https://perma.cc/M8L4-9TLH] (explaining that Jones Day, one of the largest firms in the country, is accused of providing the best opportunities and highest salaries to their male employees—“even when their legal skills are notably deficient”—and penalizing female employees, particularly when they took maternity leave, or had children).

3. See MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

4. *Id.* (“This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”).

5. *Id.* cmt. 5.

6. See *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (prohibiting race-based discrimination during jury selection).

sanctions. Turning to the illustrative context of jury exclusion, Part III argues that notwithstanding Model Rule 8.4's merely *theoretical* application to voir dire to date, it should be viewed as an additional resource for practitioners, jury reform advocates, and even prospective jurors who seek redress for exclusionary practices that strip the jury system of its democratic and inclusive character.

I. THE HISTORY AND ADOPTION OF REVISED MODEL RULE 8.4(G)

In 2008, the ABA added the elimination of bias and enhancement of diversity within the legal profession as critical ethical aspirations.⁷ In this spirit, the ABA amended Model Rule 8.4 as part of an affirmative effort to better regulate attorney misconduct.⁸ The amendment process resulted in a new subsection (g),⁹ created to deter discriminatory and harassing behavior that was expressly "related to the practice of law."¹⁰ Among the innovations of the revision is a mens rea requirement that encompasses even unknowing conduct, including that of attorneys who *reasonably should know* they are engaged in misconduct.¹¹ The new Model Rule 8.4(g) also features an expanded list of protected groups, including those who face discrimination on the basis of ethnicity, gender identity, and marital status.¹² Yet, Comment 5 delineates one specific example of conduct that does not, in and of itself, constitute impermissible discrimination: an adjudicated violation of *Batson v. Kentucky*¹³ during jury selection.¹⁴ The comment notes, in effect, that a

7. AM. BAR ASS'N, REVISED RESOLUTION 109 AND REPORT 1 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [<https://perma.cc/XU5L-DPHH>].

8. *Id.* The 2007 amendment to the judicial code of conduct included the adoption of Model Rule 2.3: "Bias, Prejudice, and Harassment." *Id.* The goal of this amendment is to provide a comparable provision for lawyer professional conduct. *See id.*

9. Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4 [<https://perma.cc/P2RG-QZLY>]. The amendment added subsection (g) but maintained the previously adopted subsections (a) to (f).

10. MODEL RULES OF PRO. CONDUCT r. 8.4(g). In full, Model Rule 8.4(g) states that it is professional misconduct for a lawyer to:

[E]ngage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id.

11. The knowledge component requires that lawyers "know or reasonably should know" that their conduct is harassment or discrimination. *Id.* "Know," "reasonably," and "reasonably should know" are defined in Model Rule 1.0(f), (h), and (j), respectively. Additionally, the amended rule does not force a lawyer to comply with the 8.4(g) restrictions as long as the lawyer has a good faith belief that no valid obligation exists. *See id.*

12. *Id.*

13. 476 U.S. 79 (1986).

14. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5.

peremptory challenge exercised in a discriminatory manner will not be enough, on its own, to constitute misconduct under Model Rule 8.4.¹⁵

As I show in the sections that follow, reception to and adoption of Model Rule 8.4(g) and other antidiscrimination rules has been gradual, even as attention to systemic racism and bias in the legal profession has increased.

A. States Adopting Model Rule 8.4(g) in Its Entirety

After its passage by the ABA, two states and three U.S. territories adopted Model Rule 8.4(g) in its entirety. This included Maine¹⁶ and Vermont, which adopted it to add greater detail to their extant misconduct rules,¹⁷ along with the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.¹⁸ There has been one documented violation of Model Rule 8.4(g) in Vermont since its adoption.¹⁹

B. States with Other Rules or Comments Addressing Discrimination and/or Harassment

At present, twenty-nine states have adopted rules that explicitly prohibit discrimination. Thirty-three states have similar rules and/or comments to Model Rule 8.4 that prohibit discrimination and/or harassment by lawyers.²⁰ California, for example, has a distinct rule addressing conduct that constitutes prohibited discrimination, harassment, and retaliation.²¹ Some of these states have removed a requirement of knowledge on the part of the offending

15. *See id.* The comment additionally specifies that attorneys are able to limit the scope and subject matter of their practices without violating the rule, provided such limitations meet the requirements of other Model Rules, including 1.5(a), 6.2, and 1.2(b). *See id.*

16. *See* ME. PRO. CONDUCT R. 8.4. While Maine adopted ABA Model Rule 8.4(g), the language is not an exact match to the ABA language and does not bar discrimination on the basis of marital status or socioeconomic status. *See id.*

17. VT. PRO. CONDUCT R. 8.4(g).

18. *See* AM. SAM. HIGH CT. R. 104; N. MAR. I. ATT'Y DISCIPLINE & PROC. RESP. R. 3(1); V.I. SUP. CT. R. 303(a).

19. *See In re Robinson*, 209 A.3d 570 (Vt. 2019).

20. Not including Vermont, as it was discussed in the "full adoption" paragraph. The rules of the thirty-two states include: ARIZ. PRO. CONDUCT R. 8.4; ARK. PRO. CONDUCT R. 8.4; CAL. PRO. CONDUCT R. 8.4; COLO. PRO. CONDUCT R. 8.4; CONN. PRO. CONDUCT R. 8.4; DEL. LAWS.' PRO. CONDUCT R. 8.4; FLA. BAR R. 4-8.4; IDAHO PRO. CONDUCT R. 8.4; ILL. PRO. CONDUCT R. 8.4; IND. PRO. CONDUCT R. 8.4; IOWA PRO. CONDUCT R. 32:8.4; ME. PRO. CONDUCT R. 8.4; MD. ATT'YS PRO. CONDUCT R. 19-308.4; MINN. PRO. CONDUCT R. 8.4; MO. SUP. CT. R. 4-4.8; NEB. SUP. CT. R. § 3-508.4; N.H. PRO. CONDUCT R. 8.4; N.J. PRO. CONDUCT R. 8.4; N.M. PRO. CONDUCT R. 16-804; N.Y. PRO. CONDUCT R. 8.4; N.C. PRO. CONDUCT R. 8.4; N.D. PRO. CONDUCT R. 8.4; OHIO PRO. CONDUCT R. 8.4; OR. PRO. CONDUCT R. 8.4; R.I. PRO. CONDUCT R. 8.4; S.C. PRO. CONDUCT R. 8.4; TENN. SUP. CT. PRO. CONDUCT R. 8.4; TEX. DISCIPLINARY PRO. CONDUCT R. 5.08; UTAH PRO. CONDUCT R. 8.4; WASH. STATE CT. PRO. CONDUCT R. 8.4; W. VA. PRO. CONDUCT R. 8.4; WIS. ATT'YS PRO. CONDUCT R. 20:8.4; WYO. ATT'YS AT L. PRO. CONDUCT R. 8.4. Texas's rule is under "Law Firms and Associations, Prohibited Discriminatory Activities," not in the 8.4 misconduct section of the rules, but it does address discriminatory behavior. *See* TEX. DISCIPLINARY PRO. CONDUCT R. 5.08.

21. CAL. PRO. CONDUCT R. 8.4.1.

lawyer, in place of “intent.”²² Indiana’s rule is further distinguished by its reliance on actual conduct, manifested through words or actions, while omitting a requirement that the offending party act with intent.²³

Of the thirty-three states with rules or comments similar in substance to Model Rule 8.4, twenty-two require that the misconduct be carried out “knowing[ly].”²⁴ Seventeen of those states have adopted Comment 3 to Model Rule 8.4, which includes a knowing standard for engaging in conduct that manifests bias or prejudice toward others.²⁵ Three states require that the lawyer who engages in discriminatory conduct intends to do so or that the conduct is intended or likely to cause harm.²⁶ The remaining seven states do not have rules that include a requirement of knowledge or intent with respect to alleged attorney bias, discrimination, or harassment.²⁷

22. COLO. PRO. CONDUCT R. 8.4. In Colorado, the rule is dependent on the actual conduct and the intent of the attorney:

It is professional misconduct for a lawyer to: . . . engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.

Id.

23. IND. PRO. CONDUCT R. 8.4 (prohibiting lawyers from “engag[ing] in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule”).

24. These states include: Arizona (comment), Colorado (comment), Connecticut (comment), Delaware (comment), Florida (rule—also a “callous indifference” standard used), Idaho (comment), Illinois (rule and comment), Iowa (including, in a rule and in the comment, a knowing standard for allowing staff in an attorney’s control to engage in such conduct), Maine (rule and comment), Maryland (rule), Nebraska (comment), New Hampshire (comment), New Mexico (comment), North Dakota (rule and comment), Oregon (rule), Rhode Island (comment), South Carolina (comment), Tennessee (comment), Utah (comment), West Virginia (comment), Wisconsin (comment), and Wyoming (comment). Vermont is not on the list but does have a knowing standard, as it adopted Model Rule 8.4 in its entirety. *See* VT. PRO. CONDUCT R. 8.4(g).

25. COLO. PRO. CONDUCT R. 8.4; DEL. LAWS.’ PRO. CONDUCT R. 8.4; IDAHO PRO. CONDUCT R. 8.4; ILL. PRO. CONDUCT R. 8.4; IOWA PRO. CONDUCT R. 32:8.4; NEB. SUP. CT. R. § 3-508.4; N.H. PRO. CONDUCT R. 8.4; N.M. PRO. CONDUCT R. 16-804; N.D. PRO. CONDUCT R. 8.4; R.I. PRO. CONDUCT R. 8.4; S.C. PRO. CONDUCT R. 8.4; TENN. SUP. CT. PRO. CONDUCT R. 8.4; UTAH PRO. CONDUCT R. 8.4; VT. PRO. CONDUCT R. 8.4; W. VA. PRO. CONDUCT R. 8.4; WIS. ATT’YS PRO. CONDUCT R. 20:8.4; WYO. ATT’YS AT L. PRO. CONDUCT R. 8.4.

26. COLO. PRO. CONDUCT R. 8.4; N.J. PRO. CONDUCT R. 8.4; N.C. PRO. CONDUCT R. 8.4.

27. These states’ rules include: ARK. PRO. CONDUCT R. 8.4; CAL. PRO. CONDUCT R. 8.4 cmt. 3; IND. PRO. CONDUCT R. 8.4; MINN. PRO. CONDUCT R. 8.4; N.Y. PRO. CONDUCT R. 8.4; OHIO PRO. CONDUCT R. 8.4; WASH. STATE CT. PRO. CONDUCT R. 8.4.

C. States That Have (So Far) Declined to Adopt the Amended Rule

Several states have declined to adopt the amended rule altogether. Montana,²⁸ Texas,²⁹ and Louisiana³⁰ have chosen not to do so, for example, citing First Amendment concerns. In contrast to most states that have rules or language that address discriminatory conduct, Rule 5.08 of Texas's Disciplinary Rules of Professional Conduct ("Prohibited Discriminatory Activities"), which regulates willful expressions of bias or prejudice in connection with legal proceedings, can be found under "Section V: Law Firms and Associations."³¹ More often, these types of rules are found in "Section VIII: Maintaining the Integrity of the Legal Profession."³² It is even more common for rules prohibiting discriminatory conduct to be found under states' "misconduct" rules (often, Model Rule 8.4). Two states, South Carolina³³ and Tennessee,³⁴ have declined to adopt Model Rule 8.4(g), though both have rules (or comments) that explicitly address discrimination.

28. In Montana, the legislature's joint resolution accused the rule of "seek[ing] to destroy the bedrock foundations and traditions of American independent thought, speech, and action." S.J. Res. 15, 65th Leg., Reg. Sess. (Mont. 2017).

29. In Texas, the legislature cited similar concerns about speech protected by the First Amendment, stating that the rule would "severely restrict attorneys' ability to engage in a meaningful debate on a range of important social and political issues." Tex. Op. Att'y Gen. No. KP-0123 (Dec. 20, 2016), 2016 WL 7433186.

30. In Louisiana, the legislature found the phrase "conduct related to the practice of law" to be overbroad and chilling to a substantial amount of speech that is constitutionally protected." *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, LA. STATE BAR ASS'N, <https://www.lsba.org/NewsArticle.aspx?Article=c959815a-a774-441e-b411-92fe9a2dbb16> [https://perma.cc/AVU2-YBPK] (last visited Jan. 27, 2021).

31. TEX. DISCIPLINARY PRO. CONDUCT R. 5.08.

32. *Id.* r. 8.04.

33. S.C. PRO. CONDUCT R. 8.4 cmt. 3. The South Carolina rule regarding attorney misconduct addresses manifestation of attorney bias or prejudice in Comment 3 to the rule:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Id.

34. TENN. SUP. CT. PRO. CONDUCT R. 3.8. In Tennessee, the only area where the rules address discrimination is in the comments to Rule 3.8 ("Special Responsibilities of a Prosecutor"). *Id.* r. 8.4. Tennessee included Comment 3 in its misconduct rule, which addresses attorney bias or prejudice in the course of representing a client:

A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Id.

D. States That Do Not Regulate Attorney Discrimination and/or Harassment

Fifteen states and two territories do not have ethics rules that address discrimination, harassment, or bias.³⁵ In addition, three states have omitted Comment 3 from their versions of Model Rule 8.4 that speak directly to prohibiting discriminatory conduct.³⁶ Oklahoma and Virginia, for example, removed Comment 3 from their Model Rule 8.4 equivalent, with Virginia noting, in its place: “ABA Model Rule Comment not adopted.”³⁷

II. DETERRING MISCONDUCT THROUGH ETHICS RULES

In the United States, the legal profession is regulated by both formal rules and informal norms.³⁸ The model ethics rules, including Model Rule 8.4(g), can thus be viewed as part of an effort to reflect and reinforce normative commitments to valued antidiscrimination principles. In this respect, and even apart from their regulatory function and the potential sanctions that flow from their violation, such rules are central to the working life of an attorney. They not only determine eligibility to practice but also help shape a lawyer’s perception of her identity as a professional.³⁹ Formal legal ethics rules have largely developed within the self-regulating regime of the profession, where the legal community is afforded substantial autonomy to regulate itself.⁴⁰ The federal courts have independent authority to adopt rules of practice and to discipline attorneys, though most follow the ethics rules of the state in which the court sits.⁴¹ In almost all jurisdictions, once state supreme courts have adopted model rules, they carry the force of law.⁴² Though few enforceable legal sanctions for unethical behavior existed before the promulgation of the Model Rules of Professional Conduct,⁴³ courts and

35. See ALA. PRO. CONDUCT R.; ALASKA PRO. CONDUCT R.; D.C. PRO. CONDUCT R.; GA. PRO. CONDUCT R.; GUAM PRO. CONDUCT R.; HAW. PRO. CONDUCT R.; KAN. PRO. CONDUCT R.; KY. SUP. CT. PRO. CONDUCT R.; LA. PRO. CONDUCT R.; MASS. SUP. JUD. CT. PRO. CONDUCT R.; MICH. PRO. CONDUCT R.; MISS. PRO. CONDUCT R.; MONT. PRO. CONDUCT R.; NEV. PRO. CONDUCT R.; OKLA STAT. tit. 5, app. 3-A (2020); S.D. CODIFIED LAWS § 16-18-app. (2020); VA. PRO. CONDUCT R.

36. Massachusetts has reserved Comment 3 to Rule 8.4 for future modification. MASS. SUP. JUD. CT. PRO. CONDUCT R. 8.4.

37. OKLA STAT. tit. 5, app. 3-A; VA. PRO. CONDUCT R.

38. DEBORAH L. RHODE & GEOFFREY C. HAZARD JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 8 (2d ed. 2006).

39. *Id.* at 4.

40. GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION 111 (2018) (noting that the legal profession has developed in this manner as part of a social compact to “restrain self-interest, to promote ideals of public service, and to maintain high standards of performance”).

41. *Id.* at 115; see also Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 75–76 (2009).

42. *Id.* at 113.

43. W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice*, 71 FORDHAM L. REV. 1567, 1567 (2003).

regulatory authorities now enforce a complex body of law that governs lawyers' everyday work.⁴⁴

A common critique of the ethics rules that regulate the legal profession is their underenforcement.⁴⁵ Still, the rules can promote lawyers' regulation of their own and others' behavior by articulating shared values and professional norms. One impetus for lawyers' self-regulation is their expectation that reputational damage and the possibility of sanction might result from violations of the rules. To grasp the deterrent potential of formal ethics rules, it is necessary to focus on how the rules affect lawyers' understandings of the possible or probable consequences of taking certain actions and failing to take others.

A. Professional Self-Regulation

Ethics rules promote self-regulation by modifying the personal and professional outcomes associated with compliance and infraction. In rare cases, compliance with ethics rules can lead to the enhancement of one's professional reputation—marked by awards that celebrate the ethical performance of one's duties—"fairness," "integrity," "professionalism," "public trust," and a "commitment to justice."⁴⁶ Formal and informal recognition may even be accompanied by public social gatherings that both "signal" ethical aptitude and offer credentials that can be commoditized or otherwise integrated into law firms' presentations of their employees.⁴⁷

44. *Id.*

45. See generally Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

46. This sort of biographical text can be found in descriptions of the winners of the Arizona Prosecuting Attorneys' Advisory Council "Lifetime Achievement Awards." *Lifetime Achievement Awards*, APAAC, <https://www.apaac.az.gov/awards/lifetime-achievement-awards> [https://perma.cc/6W64-FR56] (last visited Jan. 27, 2021); see also *Criminal Justice Section Awards*, N.Y. STATE BAR ASS'N, <https://nysba.org/awards-competitions/criminal-justice-section-awards> [https://perma.cc/Y6Y7-4PD5] (last visited Jan. 27, 2021) (discussing that these awards are given to an "Outstanding Prosecutor," whose "professional conduct evidences a true understanding of a public prosecutor's duty to advance the fair and ethical administration of criminal justice"). There is also peer-review-based ethical recognition for professional conduct. See, e.g., *Martindale-Hubbell Attorney Peer Ratings and Client Reviews*, MARTINDALE, <https://www.martindale.com/ratings-and-reviews> [https://perma.cc/9XYU-EYQA] (last visited Jan. 27, 2021) ("A second rating was also given to go along with the [legal ability] rating and that was a 'V,' meaning that the attorney's peers stated they had 'Very High' ethical standards. Over the years this transitioned to 'AV', 'BV', and 'CV' ratings—with an 'AV' rating meaning that the attorney had reached the highest of professional excellence and is recognized for the highest levels of skill and integrity.").

47. William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652 (2003); see also Milton C. Regan Jr., *Professional Reputation: Looking for the Good Lawyer*, 39 S. TEX. L. REV. 549, 554–57 (1998) (discussing the various contexts in which a lawyer's professional reputation is relevant, including "for reasons ranging from personal identity, to the ease of conducting negotiation or litigation, to the possibility of obtaining referrals"); Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 176 (2008) ("Because of the importance of lawyers' reputations in the minds of prospective clients, lawyers' desires to maintain specific types of reputation have

Beyond the possibility of public recognition, however, ethics rules can also encourage lawyers to consider whether their decisions reflect praiseworthy conduct in their profession.⁴⁸ The jury selection process offers an illustrative example of how fear of reprimand changes attorney behavior. Even the threat of an adjudicated *Batson* violation, however uncommon in practice, can lead federal prosecutors to modify their approaches to evaluating and dismissing prospective jurors.⁴⁹ This is because prosecutors are often more concerned about how their decisions might affect the perception of their motivations and biases than they are about the actual likelihood of professional repercussions in the form of a *Batson* violation.⁵⁰ This empirical reality may stem from the fact that lawyers perceive violations of antidiscrimination law governing jury selection as embarrassing or contrary to their professional duties.⁵¹ To this end, lawyers frequently work to manage colleagues', judges', and adversaries' impressions of themselves, especially when they are repeat players.⁵² If a judge was to perceive a prosecutor's behavior as shameful, for example, then judges may view the entire district attorney's office in a negative light.⁵³ And if colleagues perceive behavior as counterproductive or antithetical to collaborative work, it can precipitate adverse employment consequences, including forgone case assignments, promotions, additional work product review, or transfer to different units.

B. Creating Norms and Expectations

Model ethics rules also articulate the normative expectations of the legal community to the practitioners who join its ranks.⁵⁴ Law and psychology scholar Jeffrey J. Rachlinski, for example, has argued that ethics rules have

significant impact on the implementation of professional rules and other legal constraints on lawyer behavior.”).

48. See generally Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3587892 [<https://perma.cc/SL38-ZHRJ>].

49. See Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 370 (2005).

50. Offit, *supra* note 48 (manuscript at 47).

51. *Id.* (manuscript at 58–59) (“Beyond instrumental concern about the possibility of later appeal, the negative valence of racism and sexism in American society at-large, coupled with public scrutiny of exclusion at the hands of prosecutors, heightened Assistant U.S. Attorney’s desire to avoid patterns of professional behavior indicative of animus toward particular groups.”).

52. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269, 278 (Leslie C. Levin & Lynn Mather eds., 2012) (“In some jurisdictions, opposing counsel tend to see each other frequently, and they understand that conflicts have high costs in compromising their ability to negotiate guilty pleas and achieve other efficiencies.”).

53. *Id.* (“In particular, individual prosecutors or their offices as a whole may respond to how other local actors and agencies regard their behavior, preferring others to regard their behavior as legitimate and consistent with established practices and conventions.”).

54. See generally Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

an expressive function that precipitates changes in social norms.⁵⁵ Unsurprisingly, the attachment of criminal punishment to certain conduct can prompt critique or condemnation by others.⁵⁶ As a result, and even in the absence of enforcement, the existence of rules can reduce the prevalence of socially undesirable behavior.⁵⁷ In a similar vein, legal ethics scholar W. Bradley Wendel has argued that lapses in professional judgment often result from failures of “internalized standards of professional conduct” that attorneys reinforce through the “monitoring and criticism” of fellow lawyers.⁵⁸ In the context of the criminal justice system, Wendel argues that this sort of informal monitoring and surveillance advances notions of “honor” that balance “the opposing obligations to be a zealous advocate for the interests of one’s client, as well as an officer of the court.”⁵⁹

Wendel also suggests that the Model Rules can regulate behavior informally. This includes sanctioning in the form of being the subject of gossip by colleagues or opposing counsel.⁶⁰ Informal behavioral regulation can also take the form of lawyers responding to unethical behavior by becoming uncooperative in scheduling and administrative matters, practicing “by the book” so as to increase expenses and other adverse effects on clients and judges, or excluding unethical lawyers from referral networks.⁶¹ In this manner, informal forms of ethical regulation among legal actors who work with each other regularly can become as, if not more, influential than formal legal sanctions.

Law and society scholars have also discussed the fluid relationship between legal sanctions and informal norms of conduct. Stewart Macaulay’s influential study of “exchange relationships,”⁶² for example, observed the extent to which businesses treated purchase agreements as contracts despite the fact that such agreements did not meaningfully plan for contingencies and could not be used to induce performance.⁶³ Macaulay noticed, in particular, that businesses felt greater motivation to comply with agreements out of an interest in maintaining strong and enduring relationships than because of the threat of potential litigation.⁶⁴ Likewise, Lisa Bernstein, who studied nonlegal regulation in the cotton industry, noted that “a transactor’s sense of self-esteem, his position in the community, and his social connections were

55. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1538–39 (2000).

56. *Id.* at 1544 (“Criminalizing undesirable conduct to support a social norm can embolden people to levy informal sanctions against a violator and signal potential violators that their conduct will draw a severe social sanction.”).

57. *Id.*

58. GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 19–20 (3d ed. 1999).

59. Wendel, *supra* note 43, at 1570.

60. W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1953, 1969 (2001).

61. *Id.* at 1959–60.

62. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 56 (1963).

63. *Id.*

64. *Id.* at 63.

intertwined with his business reputation.”⁶⁵ Breach of contract could thus harm one’s social, as well as professional, well-being.⁶⁶

It is precisely these types of extralegal concerns that make lawyers sensitive to informal sanctions, including gossip or “war stories” that might lead others to view them as uncooperative, aggressive, or untrustworthy.⁶⁷ Although reputational self-consciousness can be useful in regulating behavior in repeat interactions, it may be less effective in influencing one-off interactions in which lawyers know they are unlikely to encounter each other in the future.⁶⁸ Still, even the possibility or threat of destructive gossip can serve to deter unethical behavior⁶⁹—with ethics rules supplying normative force for such self-consciousness. This threat is only more acutely felt at a time when allegations of wrongdoing can circulate publicly and instantaneously through social media.⁷⁰

In the criminal context, empirical research by Ellen Yaroshefsky and Bruce A. Green has shed light on the roles these considerations can play in the everyday decision-making of prosecutors. They observed that one of the greatest influences on prosecutorial conduct was informal peer pressure.⁷¹ In particular, they found that prosecutors’ conduct was shaped by their preference for having others “regard their behavior as legitimate and consistent with established practices and conventions.”⁷² This heightened self-awareness on the part of prosecutors is only amplified by the fact that they often work with the same judges or defense attorneys; prosecutors have a stake in establishing and maintaining good reputations, as they rely on the good will of the courts and public defenders’ offices for the smooth management of their work.⁷³ Even an informal expression of frustration or disapproval from a judge can jeopardize this productive and advantageous rapport.⁷⁴ Other studies have corroborated this insight into the social

65. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1749 (2001).

66. *Id.*

67. *Id.*; see also Wendel, *supra* note 43, at 1599 (“Judges often rely on the reputation of counsel or the history of dealing with one of the lawyers when making discretionary judgments. If one lawyer has appeared uncooperative, the judge may rule against her in a discovery dispute, even though the judge would have been inclined to grant a different lawyer a break.”).

68. Wendel, *supra* note 43, at 1605.

69. *Id.*

70. Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html> [<https://perma.cc/LV46-PVPG>].

71. Yaroshefsky & Green, *supra* note 52, at 277–78.

72. *Id.* at 278; see also Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 449–50 (2002) (“However much (or little) we enforce professional regulation, we have to acknowledge that courts and disciplinary agencies never will become familiar with most activities in which prosecutors engage. We inevitably rely heavily on prosecutorial self-regulation and self-enforcement. . . . [R]ightly or wrongly, the perception of independence contributes to federal prosecutors’ sense of self-worth.” (footnote omitted)).

73. *Id.*

74. *Id.*

dynamics of the courtroom work group, including relationships among prosecutors, public defenders, and judges.⁷⁵

The impact of formal ethics rules—and informal ethics norms—on prosecutorial behavior and decision-making is especially important in the context of jury selection, discussed in the next part. This is because prosecutorial misconduct, discrimination, and abuses of discretion have been a central focus of those attuned to the pervasive problem of race-based jury exclusion and systemic racism in the legal system more broadly.⁷⁶

III. APPLICATIONS OF MODEL RULE 8.4(G) TO DISCRIMINATION DURING JURY SELECTION

As a matter of both practice and scholarly focus, jury selection has long been considered a locus of race-based discrimination in the legal system.⁷⁷ Of particular concern is the extent to which lawyers can use peremptory challenges to strike otherwise eligible jurors of color with impunity.⁷⁸ Although the *Batson* doctrine ostensibly forbids the racial exclusion of prospective jurors,⁷⁹ attorneys can easily circumvent the law by offering race-neutral explanations for the peremptory strikes they exercise, if challenged.⁸⁰ Among the limitations of *Batson*, scholars have highlighted the doctrine's emphasis on discerning racial animus on the part of attorneys accused of dismissing jurors based on race.⁸¹ This has prompted concern

75. See, e.g., Marc G. Gertz, *The Impact of Prosecutor/Public Defender Interaction on Sentencing: An Exploratory Typology*, 5 CRIM. JUST. REV. 43 (1980); Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1 (2013).

76. See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

77. See, e.g., Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012) (finding that prosecutors in capital prosecutions were 2.5 times more likely to strike otherwise eligible Black prospective jurors from venires than white jurors); Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 414 (2017) (examining the extent to which lawyers' exercise of peremptory challenges based on citizens' arrest records lead to the disproportionate exclusion of Black and Latinx prospective jurors); Sheri Lynn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71 (2014) (acknowledging the centrality of race to prosecutors' approaches to jury selection and outlining the extent to which *Batson* and its progeny have failed to address the continuing problem of race-based jury exclusion); Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724467 [<https://perma.cc/CYY3-GXX8>] (examining the role that the challenge dismissals of jurors "for cause" plays in facilitating forms of socioeconomic exclusion that perpetuate racial disparities on juries).

78. See, e.g., Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585 (2012).

79. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

80. See generally EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* (2010), <https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/L865-6TDZ>].

81. See, e.g., Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 505 ("Any trial attorney with the wherewithal to refrain from using gender or race words in the explanation and the discipline to avoid accepting a juror to whom the exact same 'neutral

that the law's focus on expressions of *explicit* racial bias on the part of attorneys has come at the expense of attention to more routinized forms of prejudice that pervade peremptory⁸² and cause challenges⁸³ alike.

A. *The Amended Rule's Inclusion of an Objective Mens Rea Standard*

Concern about the impact of attorney bias on jury demographics has catalyzed state-level reform aimed at helping lawyers challenge—and remedy—the discriminatory excusal of prospective jurors. One decisive step toward enhancing the use and effectiveness of the *Batson* doctrine was implemented by the Washington State Supreme Court in *State v. Jefferson*.⁸⁴ In this attempted murder case, prosecutors used their last peremptory strike to dismiss the last remaining Black prospective juror from the venire.⁸⁵ Yet when defense counsel challenged the move, the trial court found, under the third step of the *Batson* test, that the “race-neutral” reasons the state advanced for its strike did not reflect purposeful discrimination on the part of the challenged lawyer, as the law required.⁸⁶

The Washington State Supreme Court reversed the conviction on appeal, citing numerous procedural and practical limitations of the *Batson* doctrine.⁸⁷ In an effort to modify *Batson* to address its shortcomings,⁸⁸ the court adopted a new framework for challenging discriminatory peremptory challenges: General Rule 37 (GR 37).⁸⁹ Among the innovations of the new rule was its departure from the racial animus requirement that for so long required judges to adjudicate *Batson* violations perpetrated only by explicitly biased lawyers.⁹⁰ Instead, GR 37 substitutes judges' subjective assessments of how to draw the line between deliberate and unintentional discrimination with consideration of how an “objective observer could view race or ethnicity as a factor in the use of the peremptory challenge” during the adjudication of a *Batson* challenge.⁹¹ GR 37 requires, further, that judges imagine this

explanation' would apply has beaten what one court calls the *Batson* 'charade.'" (quoting *People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. Ct. 1996))).

82. See, e.g., Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 209 (2005) (“The automatic use of these stereotypes is not necessarily related to whether the decision-maker consciously agrees or disagrees with the particular stereotype.”); see also Offit, *supra* note 77.

83. See generally Offit, *supra* note 77.

84. 429 P.3d 467 (Wash. 2018).

85. *Id.* at 471. The stated rationale for exercising a peremptory strike to remove the prospective juror was the juror's perception that jury service was a waste of time, his familiarity with the film *12 Angry Men*, and his characterization of his deliberations in a case during jury service in the past. *Id.*

86. *Id.* at 472.

87. See *id.* at 476; see also *City of Seattle v. Erickson*, 398 P.3d 1124, 1131 (Wash. 2017); *State v. Saintcalle*, 309 P.3d 326, 334–36 (Wash. 2013).

88. See Annie Sloan, Note, “What to Do About *Batson*?”: *Using a Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 242 (2020).

89. See *Jefferson*, 429 P.3d at 477.

90. See *infra* note 92 and accompanying text.

91. WASH. STATE CT. GEN. R. 37.

objective viewer as a person in possession of sophisticated knowledge of institutional and subconscious racism.⁹²

The development of Model Rule 8.4(g) reflects similar recognition of the critical need for a more expansive approach to the mens rea of attorneys engaged in discriminatory behavior during trial. Prior to its incorporation into the rule, the text of subsection (g) stated that a lawyer in violation of the rule must “knowingly manifest[]” discriminatory action⁹³—a condition that changed to “knowingly” or “reasonably should know.”⁹⁴

This significant development was the product of deliberation and compromise. When the ABA first proposed the new rule in 2015, it invited feedback on the specific question of whether the rule should include a mens rea.⁹⁵ Following this, the proposed draft that was circulated in August 2016 eliminated a knowledge (or other mens rea) requirement for the rule altogether, such that the rule read, in pertinent part: “It is professional misconduct for a lawyer to: . . . (g) harass or discriminate on the basis of race, sex, religion . . .”⁹⁶ The committee ultimately submitted a revised report with a knowledge requirement specified in the rule,⁹⁷ after some argued that in the absence of a mens rea requirement, the rule could be viewed as a quasi-criminal rule of absolute liability.⁹⁸

Much like the Washington State Supreme Court’s objective mens rea standard pertaining to juror discrimination, ABA Revised Resolution 109 recognized, in explicit terms, that the inclusion of both a subjective and objective mens rea would “safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.”⁹⁹ And the “reasonably should have known” standard was defined as “denot[ing] ‘that a lawyer of reasonable prudence and competence would ascertain the matter in question.’”¹⁰⁰

92. See *id.* r. 37(f) (“Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”). GR 37 was the product of the collaborative labor of a work group convened by the Washington State Supreme Court, drawing on input from the American Civil Liberties Union and the Washington Association of Prosecuting Attorneys. See JURY SELECTION WORKGROUP, PROPOSED NEW GR 37: FINAL REPORT (2018), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf> [<https://perma.cc/VQM6-B4S8>].

93. MODEL RULES OF PRO. CONDUCT r. 8.4(d) cmt. 3 (AM. BAR ASS’N 1998) (amended 2016).

94. *Id.* r. 8.4(g).

95. See *id.* r. 8.4 (Discussion Draft 2015).

96. AM. BAR ASS’N, RESOLUTION AND REPORT 1–2 (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf [<https://perma.cc/7MQ4-WQKA>].

97. See AM BAR ASS’N, *supra* note 7.

98. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 217 (2017).

99. AM BAR ASS’N, *supra* note 7, at 8.

100. *Id.* (citing MODEL RULES OF PRO. CONDUCT r. 1.0(j)).

Despite the similar inclusion of an objective mens rea standard, Model Rule 8.4(g) stopped short of permitting a single discriminatory peremptory challenge to rise to the level of an ethics rule violation.¹⁰¹ Instead, this part of the comment proposes the rule be interpreted as a less stringent check on illegal jury exclusion than *Batson*, which dispensed with prior case law holding that racial jury exclusion in a single trial would not violate antidiscrimination law.¹⁰² A more effective and expansive approach to the ethical regulation of jury exclusion would acknowledge the harm of illegally excluding even a single juror¹⁰³ by specifying that one discriminatory peremptory challenge should create a rebuttable presumption that Model Rule 8.4(g) has been violated.¹⁰⁴

Despite its shortcomings, it is notable that Comment 5 to Model Rule 8.4(g) explicitly references jury selection as a context in which attorneys *can be subject to ethical regulation*, even though this remains untested.¹⁰⁵ In light of this significant acknowledgment, the rule may complement and enhance *Batson* challenges as a secondary means of identifying and remediating forms of jury exclusion that deprive citizens of their right to participate in the legal system. As discussed in Part II, even the *possibility* of an ethics violation can encourage greater vigilance, care, and consciousness of *Batson* on the part of attorneys engaged in routine assessments of prospective jurors.

B. Distinguishing Illegal Discrimination from “Legitimate Advocacy”

Model Rule 8.4(g) concludes with a significant, though ambiguous, carve-out for “legitimate advice or advocacy.”¹⁰⁶ This language was not entirely new for the rule; under previous Comment 3 to Model Rule 8.4(d), the ABA stated that a

lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national

101. *Id.* at 2 (noting that a “trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of” subsection (g)).

102. *See, e.g.*, *Swain v. Alabama*, 380 U.S. 202, 221 (1965) (“This Court has held that the fairness of trial by jury requires no less. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried. With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws.” (citation and footnote omitted)).

103. The U.S. Supreme Court interprets *Batson* as holding that the discriminatory removal of a single prospective juror is a constitutional violation. *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2248 (2019) (noting that “the Constitution forbids striking even a single prospective juror for a discriminatory purpose” (citing *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016))); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

104. I thank Adam M. Gershowitz for suggesting this proposed modification of the language of Comment 5. *See also* Lonnie T. Brown Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 310–11 (2003).

105. MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2020).

106. *See id.* r. 8.4(g).

origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.¹⁰⁷

Under both the old comment and the new rule, an exception for "legitimate advocacy" thus remains intact.¹⁰⁸

Scholars and practitioners seeking clarity on this point, however, will be disappointed, as the rule fails to distinguish legitimate from illegitimate advocacy.¹⁰⁹ There was in fact no definition provided upon the term's incorporation into the comment.¹¹⁰ Some have argued that the phrase should be understood as a moral commentary on the *ends* sought through advocacy, while others have focused on legal process.¹¹¹ Yet under any definition, it remains unclear whether bias and discrimination are ever defensible parts of legal practice.¹¹² The issue becomes particularly murky in the context of jury selection, where some have argued that bias and zealous advocacy go hand in hand.¹¹³ The line between permissible and illegal jury exclusion is particularly difficult to regulate when uncontested peremptory challenges can be exercised without transparency on the part of the lawyers who use them.¹¹⁴ This conundrum led one of the drafters of Model Rule 8.4(g) to acknowledge the fact that "race, gender, and other factors are sometimes legitimate subjects of consideration" and that discussion of such attributes during voir dire should not necessarily run afoul of the rule.¹¹⁵

The rule is clear that a single *Batson* violation will not trigger an ethics violation. In writing about the previous iteration of the rule, one scholar has argued that the placement of the reference to a peremptory challenge *after* its reference to legitimate advocacy (in Comment 2) suggests that it was not the intent of the rule drafters for *Batson* violations to automatically precipitate ethics violations.¹¹⁶ A more probable interpretation, however, is one that the same author concludes with: though a single *Batson* violation may not in itself rise to the level of an ethics violation, a *Batson* violation alongside *other*

107. *Id.* r. 8.4(d) cmt. 3 (amended 2016).

108. Interestingly, though the drafters of Model Rule 8.4(g) in 2016 initially chose not to include a legitimate advocacy provision in the rule, they reversed course soon after. See Michael William Fires, Note, *Regulating Conduct: A Model Rule Against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 746 (2017).

109. See *id.* at 741.

110. *Id.*

111. See Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL'Y 773, 786 (2017).

112. Comment, *Batson v. Kentucky and the ABA Model Rules of Professional Conduct: Is a Violation of Batson Also an Ethical Violation?*, 29 J. LEGAL PRO. 205, 210 (2005).

113. See, e.g., Abbe Smith, "Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523, 528–30 (1998) (defending the ability for defense attorneys to strike or empanel prospective jurors based on race).

114. See EQUAL JUST. INITIATIVE, *supra* note 80, at 47.

115. Fires, *supra* note 108, at 742.

116. See Comment, *supra* note 112, at 210–11.

“biased conduct or some other aggravating factor” *may* rise to the level of an ethics violation.¹¹⁷

In contrast to Model Rule 8.4(g)’s open-ended reference to legitimate advocacy, modifications of the *Batson* doctrine, including Washington State’s GR 37, have sought to add greater specificity to impermissible juror discrimination. Washington’s rule, for instance, designates particular bases for peremptory challenges presumptively invalid to the extent that they have historically encompassed protected groups, including those who have past contact with law enforcement officers or who distrust the police.¹¹⁸ Reference to aspects of a juror’s demeanor, such as her “inattentive[ness]” is also regarded by the rule as having “historically been associated with improper discrimination.”¹¹⁹ As an ethics rule extending to misconduct beyond jury exclusion, it is hardly surprising that Model Rule 8.4(g)’s regulation of discriminatory forms of juror assessment leaves the *Batson* doctrine, and a judge’s discretion to enforce it, unaltered. Yet, the revision of the rule to incorporate an objective mens rea standard, combined with the ability of even underenforced antidiscrimination rules to modify conduct discussed in Part I, holds promise for the rule’s continued adoption and more expansive application.

CONCLUSION

Jury selection proceedings, among other sites of racial exclusion in the U.S. legal system, remind us of the vital importance of ethics rules as both a moral compass and practical deterrent for reputation-conscious practitioners. In its newly revised form, which includes an objective mens rea standard and explicit reference to *Batson* violations as a trigger for ethical scrutiny, Model Rule 8.4(g) should be applied to the task of further democratizing juries. To the extent that the threat (if not reality) of an adjudicated *Batson* violation already prompts lawyers to modify their assessments of jurors during the peremptory challenge phase of voir dire, as discussed in Part II, the explicit threat of an ethics violation can only enhance antidiscrimination law’s potential.

117. *Id.* at 210.

118. *See* WASH. STATE CT. GEN. R. 37.

119. *Id.*